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09/554,969	05/23/2000	GAYLE MARIE FRANKENBACH	7258X	1835

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EXAMINER

HARDEE, JOHN R

ART UNIT PAPER NUMBER

1751

DATE MAILED: 09/30/2002

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Paper No. 12

Application Number: 09/554,969

Filing Date: May 23, 2000

Appellant(s): G. M. Frankenbach et al.

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Jason J. Camp

For Appellant

Art Unit: 1751

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed September 6, 2002.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

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**(5) Summary of Invention**

The summary of invention contained in the brief is correct.

**(6) Issues**

The appellant's statement of the issues in the brief is incorrect because, upon further consideration, claims 22 and 24 are objected to as being dependent from a rejected claim but would be allowable if rewritten in independent form.

**(7) Grouping of Claims**

The appellant's statement in the brief that certain claims do not stand or fall together is not agreed with because the amounts of electrolyte recited in claims 1, 12, 13 and 14 overlap and are therefore not separately patentable.

**(8) Claims Appealed**

A substantially correct copy of appealed claims 1 and 12-39 appears on pages 5-14 of the Appendix to the appellant's brief. The minor errors are as follows: Applicant has changed the numbering of the parts of Claim 1 from a-f to 1-5 and f.

**(9) Prior Art of Record**

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

WO 97/03169

TRINH et al.

1-1997

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**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 12-21, 23 and 25-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 97/03169. The reference discloses concentrated fabric softening compositions made using a principal solvent with a ClogP of about 0.15 to about 0.64 in combination with diester quaternary ammonium softening actives (abstract). Compositions may further comprise solvents such as ethanol and isopropyl alcohol, which have much lower Clog P values (see examples). Solvents outside the recited range may be added (claim 52). Suitable ester quats are depicted in Fig. 1 on p. 18 and Fig. 2. on p. 23. The use of mixtures of quats is taught at the bottom of p. 17. Compositions may further comprise up to about 2% of electrolytes, such as calcium and magnesium salts, especially the chlorides, to improve the stability of the compositions (para. bridging pp. 93-94). The examiner takes the position that the disclosed diester quats exhibit the claimed phase transition temperatures, as they meet the claimed structural limitations. In addition, the diester quats disclosed by appellant as preferred (specification, p. 11, 4th whole para.) are also taught by the reference as being suitable (p. 23, lines 1-5). Regarding claims 18-21, 23 and 35, the teaching of a ClogP of about 0.15 to about 0.64 meets the limitations of claims reciting solvents with a ClogP just outside this range. The desirability of minimizing viscosity is disclosed at p. 191, lines 7+. This reference differs from the claimed subject matter in that it does not disclose a composition which reads on appellant's claims with sufficient specificity to constitute anticipation.

It would have been obvious at the time the invention was made to make such a composition, because this reference teaches that all of the ingredients recited by appellants are suitable for inclusion in a surfactant composition. The person of ordinary skill in the surfactant art would expect the recited compositions to have properties similar to those compositions which are exemplified, absent a showing to the contrary.

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In the case where the claimed ranges overlap or lie inside ranges disclosed by the prior art, a *prima facie* case of obviousness exists. *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed Cir. 1990).

**(11) Response to Argument**

Appellant's arguments have been carefully considered, but they are not considered persuasive. Appellant argues that the use of electrolyte in the prior art compositions is optional, and that in the exemplified compositions the amount of electrolyte does not exceed 0.25%, which is less than the amount recited by appellant. Appellant goes on to argue that the reference does not teach or suggest compositions comprising about 0.5% to about 10% of electrolyte. This is not persuasive, because the reference clearly teaches that up to 2% of electrolyte may be used, regardless of what is exemplified. A prior art reference may be relied upon for all that it would have reasonably conveyed to one having ordinary skill in the art, including nonpreferred embodiments. Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure on nonpreferred embodiments. Appellant's arguments regarding the formulation of clear compositions is not persuasive because the reference discloses (abstract) that the compositions taught therein are clear.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



John R. Hardee  
Primary Examiner

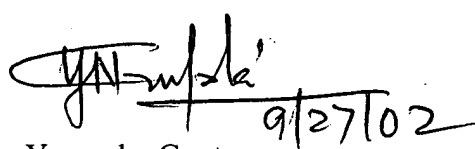
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